No. 80-1615

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In the Supreme Court of the United States

OCTOBER TERM, 1980

PAUL BENDETTI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners, each of whom is represented by separate counsel, will be deprived of effective assistance of counsel or of a right to counsel of their own choosing by the district court's order, entered for the purpose of preventing potential conflicts of interest at their pending trial, that limits participation by another attorney on behalf of all three petitioners.

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OPINION BELOW

The order of the court of appeals (Pet. App. 21a-22a) is unreported. The opinion of the district court (Pet. App. 1a-20a) is reported at 498 F. Supp. 450.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 1981. A petition for rehearing was denied on February 17, 1981. The petition for a writ of certiorari was filed on March 25, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On September 27, 1979, a federal grand jury in the District of New Jersey filed a 15-count indictment

charging petitioners and three others with illegal acts in connection with the ownership of a Nevada gaming corporation, in violation of 18 U.S.C. 2, 1952, 1962(c) and (d), and 2314.

The defendants were arraigned on October 10, 1979. At that time, Oscar B. Goodman was admitted *pro hac vice* to represent the three petitioners. The court thereupon conducted an inquiry pursuant to *United States ex rel. Hart* v. *Davenport,* 478 F.2d 203 (3d Cir. 1973), concerning potential conflicts of interest arising from Goodman's joint representation (Pet. App. 2a–4a; 10/10/79 Tr. 4, *et seq.*). The court pointed out that the divided loyalties of counsel representing multiple defendants could jeopardize the strength of any one defendant's position; that the defense of one could conflict with that of another; that plea bargaining would be hampered, perhaps made impossible, because an offer to one might be adverse to the interests of another; that one defendant's decision to testify might require his own counsel to cross examine him to mitigate testimony adverse to a co-defendant; and that vigorous examination of a witness on behalf of one defendant might have to be curtailed out of deference to the interests of another (10/10/79 Tr. 24, 32–34). The court also expressed concern that the jury might be influenced by the fact that the three defendants, who were charged with conspiracy, were all represented by one lawyer (*id.* at 19). In addition, the court cited the public interest in ordinarily not having a single lawyer represent more than one defendant in a criminal case (*id.* at 17).

Goodman acknowledged the potential for conflicts and stated that petitioners would be represented by independent counsel at trial (Pet. App. 3a), but he requested that he be permitted to represent all three

petitioners prior to trial so that his special knowledge of Las Vegas and its casinos would be available to petitioners (10/10/79 Tr. 18, 21–22, 28; Pet. App. 3a). At the conclusion of the October 10 proceedings, the trial court agreed to this arrangement (Pet. App. 4a).

2. The district court held another hearing on November 5, 1979, at which the government urged that Goodman be disqualified. The government asserted that Goodman's multiple representation had hampered discussions of immunity and cooperation; that Goodman also represented an unindicted co-conspirator; that the government had information that petitioners viewed their relative culpability differently; that Goodman ought not, at the pretrial stage, "lock in" the positions of the independent trial counsel who Goodman recognized would be necessary at trial; and that Goodman's continued representation in a complex proceeding covering a three-year conspiracy with over 100 overt acts only increased the probability of later delay, a mistrial, and appellate attack when petitioners' independent counsel later assumed responsibility (Pet. App. 4a-5a).

Although Goodman continued to urge that he be permitted to remain in the case at the pretrial stages (Pet. App. 5a), he reiterated his understanding that petitioners would have to be represented by separate counsel at trial (11/5/79 Tr. 13, 17; Pet. App. 5a–6a). Goodman also stated that he had told petitioners they would need separate counsel at trial and that they had agreed (11/5/79 Tr. 17; Pet. App. 6a).[1]

At the conclusion of the November 5 hearing, the court ordered petitioners to retain separate counsel

[1] Goodman stated: "I wouldn't let them do it any other way" (11/5/79 Tr. 17; Pet. App. 6a).

(11/5/79 Tr. 35–36; Pet. App. 6a–7a, 9a). In the court's view, separate counsel were required at that time to ensure that the trial would not be delayed at a later date when separate counsel concededly would have to be appointed and would need time to familiarize themselves with the complex case and extensive record (Pet. App. 7a). The court did not, however, order that Goodman be removed from the case altogether. It concluded that separate counsel for each petitioner could make an independent assessment of the extent to which Goodman also could participate in the representation of his client (11/5/79 Tr. 36; Pet. App. 7a). Goodman informed the court that he had anticipated the court's ruling and that discussions were already underway with other counsel (11/5/79 Tr. 36; Pet. App. 8a).

3. On December 10, 1979, the district court held another hearing, attended by the counsel retained to represent each petitioner. Each attorney represented that he had considerable criminal trial experience (Pet. App. 14a) but expressed a desire to have Goodman remain in the case as a general adviser because of his special experience in "the intricacies of Nevada law and casino gambling laws emanating from the state of Nevada" (Pet. App. 10a–11a). Vernon, who was representing petitioner DeLamos, made clear that he, not Goodman, would advise his client (Pet. App. 11a), and the attorneys representing the other two petitioners agreed with Vernon's understanding of Goodman's role (Pet. App. 12a–13a). Petitioners, too, agreed to this arrangement (12/10/79 Tr. 20-24). The district court decided that Goodman could serve in this role until trial, but reserved the question whether Goodman could participate at trial (Pet. App. 13a–14a).

4. On July 29, 1980, during a pretrial hearing, the district court considered the question of Goodman's role at trial. At petitioners' request, it described in general terms the manner in which it would allow Goodman to participate (7/29/80 Tr. 22, 29, 32–33). In its subsequent opinion of September 3, 1980, the court set forth guidelines on this subject. Goodman would not be permitted to make opening or closing statements. Examination of witnesses would be decided on a case-by-case basis: if the court were satisfied that Goodman's expertise would assist petitioners, he would be permitted to examine on their behalf after appropriate instructions to the jury, but Goodman would not be permitted to examine witnesses on narrow questions that pertained only to one of the petitioners. Legal arguments could be made by Goodman to the court, again with appropriate instructions if the argument took place in the presence of the jury. And, finally, Goodman could sit at counsel table to render expert advice to the independent counsel (Pet. App. 19a–20a). Petitioners filed a notice of appeal following the July 29 hearing.

In its September 3 opinion, the district court observed (Pet. App. 16a) that the government's averments the previous November regarding the conflicts Goodman would face if he represented all three petitioners had never been specifically denied by petitioners and that further pretrial developments supported the court's conclusion that petitioners had differing interests in the case and may have engaged in varying activity with the principal government witness. The court therefore was "mystified" by petitioners' apparent suggestion, reflected in the notice of appeal, that Goodman might be permitted to take over the defense of all three petitioners. The court further observed that "[t]he situation is made even more puz-

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zling by the fact that not once but several times Goodman agreed that, at trial, [petitioners] would have separate counsel, that they understood this, and that they were agreeable to this" (Pet. App. 17a).[2]

In a brief order (Pet. App. B 21a–22a), the court of appeals affirmed the district court's order limiting Goodman's role.

ARGUMENT

The district court's careful accommodation of petitioners' interest in having Goodman participate in their trial and the competing objective of preventing

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[2] No motion was ever filed on petitioners' behalf for Goodman to *replace* counsel for all three petitioners. Attorney Vernon, who was representing petitioner DeLamos, did state at the July 29 hearing that his client expected Goodman to represent him throughout the proceedings and that, "if it comes to it," DeLamos would ask Vernon to withdraw to be replaced by Goodman or to have DeLamos defend himself (7/29/80 Tr. 24; see also *id.* at 28). The court later indicated that if Vernon moved to withdraw and to have Goodman substituted, the court would deny the motion (*id.* at 32).

Later still, Vernon stated: "Since my client is here in court I want—I would like to make abundantly clear, considering my request to withdraw and place Mr. Goodman in my place, are you now ruling formally on that?" The court responded: "That's right. I will not permit that. That undercuts everything that I've been trying to accomplish throughout the course of these pretrial proceedings" (*id.* at 35). This brief exchange cannot be treated as a considered motion for and denial of substitution of counsel, as opposed to a discussion of the issue in the hypothetical. At the conclusion of the hearing, for example, Vernon made clear that petitioners were not "seeking to give * * * away" the benefits of separate counsel, but were, instead, "seeking to have [Goodman] in addition to the three of us question [witnesses]" (7/29/80 Tr. 39). Thus, if the transcript is read as a whole, the only issue properly presented to the district court was the degree to which Goodman might participate in the proceedings, not whether Goodman could be *substituted* as counsel for any or all of the petitioners.

conflicts of interest resulting from joint representation does not warrant review at this interlocutory stage of the proceedings.

1. At a number of places in their petition, petitioners discuss (Pet. 12, 14–16, 18) the question whether a trial court may order separate counsel for defendants who purport to waive their right to the effective assistance of counsel insofar as that right might be impaired as a result of the representation of their conflicting interests by a single attorney. Contrary to petitioners' apparent suggestion, however, this case simply does not present that issue.

In the district court, Goodman acknowledged in October and November 1979, that petitioners would need separate counsel at trial, and petitioners agreed to that arrangement. In view of this acknowledgment, the district court was required to ensure separate representation by the time of trial. Cf. *Holloway* v. *Arkansas,* 435 U.S. 475 (1978). Given that separate counsel would be required at *trial,* it was manifestly reasonable for the district court to require, in November 1979, that petitioners have separate counsel at the pretrial stages as well in order to ensure their familiarity with the case and to prevent any postponement of trial that might otherwise have been occasioned by a last-minute appearance of separate counsel. Indeed, petitioners do not argue in their petition that the trial court acted unreasonably in requiring the early appointment of the separate counsel who they and Goodman had conceded would be necessary at trial in any event.

The July 29, 1980, hearing that gave rise to the appeal to the Third Circuit and to the instant certiorari petition concerned only the role Goodman would be permitted to have at trial—which was scheduled to

commence six weeks later—in the context of the separate representation that had been arranged more than eight months earlier. Although the possibility of Vernon's withdrawal from representation of petitioner DeLamos was advanced and rejected in passing at the July 29 hearing, Vernon's suggestion does not appear to have been a considered motion for substitution of counsel (see note 2, *supra*). Moreover, there was no comparable reference whatever by counsel for petitioners Bendetti and Mastro to the possibility of their withdrawal in favor of Goodman. Nor was there any discussion of a waiver by Bendetti and Mastro of any conflicts of interest that might have resulted from Goodman's representation of DeLamos at trial, in view of Goodman's personal representation of Bendetti and Mastro in earlier stages of the case. Thus, the district court was not in a position to rule on a motion for substitution of Goodman as counsel for all three petitioners or for DeLamos alone.

Similarly, the notice of appeal identified the order appealed from as that limiting Goodman's participation; petitioners' brief in the court of appeals presented the single issue whether they were denied their Sixth Amendment rights by the court's order limiting Goodman's participation (Brief for Appellants at 1); and the court of appeals decided only that single question (Pet. App. 21a–22a). The issue of separate counsel was neither presented nor decided. And, even now, petitioners do not take issue with the fact that they will have separate counsel at trial.[3]

[3] Indeed, they rely (Pet. 18–19), somewhat ironically, on the *presence* of separate counsel in support of their argument that Goodman should be permitted to have an unlimited role at

Accordingly, this case does not raise the question whether a court can require defendants to be represented by separate counsel where a conflict of interest appears.[4]

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trial. They suggest that separate counsel will prevent conflicts of interest from arising as a result of Goodman's participation on behalf of all three and will undercut the impression the jury might otherwise have that all three must have been involved in a conspiracy if they are jointly represented by the same attorney.

[4] In any event, as we explain more fully in our brief in opposition in *Lewin* v. *United States*, cert. denied, No. 80-343 (Jan. 12, 1981), at pages 6–10, petitioners err in suggesting (Pet. 14–18) that the Sixth Amendment guarantees a defendant the right to be represented by counsel of his choice even though the attorney may have a conflict of interest. (We are furnishing counsel for petitioners with a copy of our brief in opposition in *Lewin*.) Contrary to petitioners' contention, *Faretta* v. *California*, 422 U.S. 806 (1975), does not support that proposition. The Sixth Amendment right of self-representation recognized in *Faretta* was not premised on a right to waive the assistance of counsel, from which petitioners would infer the right to waive the *effective* assistance of counsel. To the contrary, the Court made clear in *Faretta* that the right of self-representation could *not* be inferred mechanically from the defendant's ability to waive the right to assistance of counsel, because " '[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right' " (422 U.S. at 819 n.15, quoting *Singer* v. *United States*, 380 U.S. 24, 34–35 (1965)). Accordingly, the Court's decision in *Wood* v. *Georgia*, No. 79-6027 (Mar. 4, 1981), slip op. 12, that a defendant may be held, after the proceeding, to have waived his right to counsel unimpeded by a conflict of interest does not mean that a defendant has a *right*, in advance of trial, to insist on counsel burdened with a conflict of interest.

The right to proceed personally, recognized in *Faretta*, is an independent right secured by the Sixth Amendment, which con-

Moreover, even assuming that petitioners were properly challenging their representation by separate counsel, the record in this case does not contain any waiver by petitioners of their right to effective, conflict-free counsel at trial, which petitioners concede (Pet. 14–15, 17–18) would be an essential predicate to allowing joint representation by counsel who has a

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fers on the accused, not his attorney, the right to make a defense, 422 U.S. at 819; see *United States* v. *Dolan*, 570 F.2d 1177, 1183 (3d Cir. 1978). When an accused invokes the assistance of counsel in making his defense, he necessarily does so, as petitioners acknowledge (Pet. 11), subject to reasonable standards governing the conduct of attorneys (*United States* v. *Dinitz*, 424 U.S. 600 (1976); cf. *Leis* v. *Flynt*, 439 U.S. 438 (1979)), including appropriate ethical standards governing conflicts of interest. Thus, contrary to petitioners' contention, defendants do not have a Sixth Amendment right to be jointly represented by the same attorney where the trial court finds a conflict of interest. See Fed. R. Crim. P. 44(c) and the Advisory Committee Note to that Rule.

Petitioners suggest (Pet. 15–16) a conflict among the circuits on the question whether a defendant who waives his right to effective assistance of counsel has a Sixth Amendment right to be represented by conflict-laden counsel. But because this case does not properly present the issue and because the district court found no adequate waiver in any event, it is not the appropriate vehicle for resolving the asserted conflict. Moreover, the decisions relied upon by petitioner—several of which do not even concern the question of a *right* to choose conflict-laden counsel (see *United States* v. *Cox*, 580 F.2d 317 (8th Cir. 1978); *United States* v. *Waldman*, 579 F.2d 649 (1st Cir. 1978))—all predated this Court's observations in *Cuyler* v. *Sullivan*, 446 U.S. 335, 346 & n.11 (1980), regarding the ethical problems inherent in multiple representation, and the December 1, 1980, effective date of Fed. R. Crim. P. 44(c), which authorizes disqualification of counsel even where the defendants purport to waive their right to conflict-free counsel.

conflict of interest. See also Fed. R. Crim. P. 44(c).[5] And the district court, noting that it had "meticulously probed into the matter on more than one occasion" (Pet. App. 16a), could not conclude that any purported "waivers" by petitioners were knowing and intelligent (*ibid.*; see also *id.* at 18a). Under these circumstances, there is no occasion for this Court to consider petitioners' assertion of a Sixth Amendment right to choose counsel who is burdened with a conflict of interest.

2. Because the district court's requirement of separate counsel at trial is not before the Court, this case concerns only the limitations the district court placed on Goodman's participation at trial to supplement the assistance of separate counsel. Petitioners contend that Goodman should be entirely unrestrained at trial and, if they so desire, should be permitted to take over the entire defense. But because the order requiring separate counsel is not before the Court, petitioners cannot challenge that order indirectly by urging that Goodman be allowed to supplant separate counsel entirely at trial despite the conflicts of interest that led

[5] The only discussion in the district court regarding petitioners' consent to joint representation despite the possibility of a conflict of interest occurred at the October hearing (10/10/79 Tr. 32–39), at which Goodman had already conceded that separate representation would be necessary at trial (*id.* at 20, 28). Thus, petitioners' "waiver" at the October hearing, if the exchange with the district court can be so characterized, obviously did not extend to joint representation at trial. Subsequently, of course, the court required separate counsel, and petitioners did not thereafter execute a waiver of any conflicts that might arise if Goodman were to take over the defense completely. Although petitioners assert (Pet. 18) that they have waived any prejudice resulting from joint representation at trial, they cite nothing in the record to support this assertion.

the district court to require the retention of independent counsel in the first place. In any event, the manner in which the district court sought, in the unique circumstances of this case, to accommodate the roles of petitioners' individual counsel with that of Goodman does not warrant review by this Court, especially at the present interlocutory stage of the case.

a. Despite the government's request in November 1979, the district court did not disqualify Goodman from the case altogether. He was allowed to participate in pretrial proceedings and in preparation for trial to the extent desired by counsel for each of the petitioners. The district court's order regarding Goodman's participation at trial necessarily was cast in general terms, with the particulars pertaining to his examination of witnesses and presentation of legal argument to be determined on a case-by-case basis at trial. Therefore, it is not possible in advance of trial to determine whether Goodman will play a major or minor role in these matters.[6] Thus, the factual basis for petitioners' claim necessarily is speculative at this stage.

b. Moreover, insofar as petitioners' claim is that the district court's accommodation of the respective roles of Goodman and petitioners' separate counsel deprives them of effective assistance of counsel, the claim plainly is premature. Only after trial will it be possible to determine whether separate counsel, assisted by Goodman, represented petitioners in a reasonably competent manner and whether any errors that occur will have prejudiced the defense. See, *e.g.*,

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[6] For this reason, petitioners err in stating (Pet. 19) that, under the district court's order, Goodman's role at trial necessarily has been reduced to that of a "silent adviser."

Chambers v. *Maroney*, 399 U.S. 42, 53–54 (1970).[7] In any event, there is nothing in the record developed thus far to suggest that petitioners will not be effectively represented at trial. They do not challenge the competence of their separate counsel, and the district court expressed its satisfaction with separate counsel's assurances that they have substantial experience in trying criminal cases (12/10/79 Tr. 31; Pet. App. 14a).

c. Similarly, there is no merit to petitioners' suggestion that the district court's order deprives them of an asserted Sixth Amendment right to counsel of their choice.[8] For the reasons stated above (see pages 7–11, *supra*), it must be assumed here that Goodman

[7] For this reason, the district court's order regarding Goodman's participation at trial was not immediately appealable under 28 U.S.C. 1291 pursuant to the "collateral order" doctrine insofar as that order implicitly rejected a claim of ineffective assistance of counsel. The district court has not conclusively determined that claim, which may be renewed after trial; it is not completely separate from the merits because, *e.g.*, the attorneys' competence and any resulting prejudice must be considered in light of the prosecution's case and the defense actually presented; and the claim will not be effectively unreviewable on appeal from a final judgment of conviction. See, *e.g.*, *Firestone Tire & Rubber Co.* v. *Risjord*, No. 79–1420 (Jan. 13, 1981), slip op. 6.

[8] There is a substantial question whether the order was immediately appealable on this ground either. This Court recently held in a civil case that orders denying motions to disqualify the opposing party's counsel are not appealable final decisions under 28 U.S.C. 1291. *Firestone Tire & Rubber Co.* v. *Risjord*, *supra*. The courts of appeals that previously held orders denying disqualification not to be appealable have not yet taken issue with the appealability of orders *granting* disqualification. See, *e.g.*, *Armstrong* v. *McAlpin*, 625 F.2d 433, 440–441 (2d Cir. 1980) (en banc), vacated and remanded on

could not properly be counsel of record for all three petitioners. Petitioners do not suggest that, if Goodman is unavailable, each of the three attorneys retained to represent them is not counsel of choice for the particular petitioner whom he represents. Thus, for present purposes, these three attorneys must be regarded as petitioners' attorneys of choice. These attorneys will be permitted to consult freely with their respective clients and to participate fully in the proceedings on their behalf. Thus, petitioners have not

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other grounds, No. 80–431 (Jan. 19, 1981); *In re Multi-Piece Rim Products Liability Litigation, Firestone Tire & Rubber Co.* v. *Risjord*, 612 F.2d 377, 378 (8th Cir. 1980) (en banc), vacated and remanded on other grounds. No. 79–1420 (Jan 13, 1981); cf. *In re Continental Investment Corp.*, 637 F.2d 1, 7 (1st Cir. 1980); *Melamed* v. *ITT Continental Baking Co.*, 592 F.2d 290, 295 (6th Cir. 1979); *Community Broadcasting of Boston, Inc.* v. *FCC*, 546 F.2d 1022, 1028 n.41 (D.C. Cir. 1976); but see *In re Benjamin*, 582 F.2d 121 (1st Cir. 1978) (order disqualifying counsel representing grand jury witness not immediately appealable; witness must refuse to testify because he was deprived of counsel and seek review of contempt citation). Nonetheless, it could be argued that a defendant's claim that the district court erred in disqualifying his attorney could adequately be reviewed on an appeal from a final judgment of conviction and therefore would not satisfy the third criterion of the collateral order doctrine.

Similarly here, where Goodman was not even disqualified from the case, it is not apparent why petitioners' claim that Goodman's role was improperly limited could not adequately be reviewed on appeal from a final judgment of conviction. Indeed, it would *better* be reviewed at that stage, when the scope of his participation would be more than a matter of speculation. Thus, the district court's order limiting Goodman's role (see *Firestone Tire & Rubber Co.* v. *Risjord*, *supra*, slip op. 10 n.13) is akin to an order on a question of trial procedure, which is not appealable. *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978).

been denied the assistance of counsel of their choice, insofar as that choice was reasonably circumscribed by the application of ethical rules regulating the conduct of attorneys in order to prevent conflicts of interest and thereby to preserve the integrity of the bar and the criminal justice system.

d. Petitioners themselves concede that their asserted right to counsel of their choice "is not absolute and must be balanced against the interests of the court in the effective administration of justice" (Pet. 11). The reasonableness of the manner in which the district court struck that balance on the particular facts of this case is a case-specific issue that does not warrant review by this Court. In any event, the district court's accommodation of the competing interests was reasonable. Although, in our view, the district court might properly have disqualified Goodman from *any* participation in the trial, it acceded to petitioners' wishes to a considerable extent by allowing him to participate insofar as appeared feasible without excessive risk of generating a conflict of interest and thereby defeating the very purpose of ordering separate counsel in the first place. In the situations where the potential for a conflict of interest is particularly strong—as in the opening statement, closing argument, or examination of witnesses on matters that relate to only one or two of the petitioners—it was reasonable for the court to require that the counsel of record for each petitioner, rather than Goodman, represent his client. Such limitations on Goodman's role to prevent a conflict of interest (see *Firestone Tire & Rubber Co.* v. *Risjord, supra,* slip op. 10 n. 13) constitute a reasonable exercise by the court of its authority to regulate the conduct of attorneys appearing before it (*United States* v. *Dinitz,* 424 U.S. 600 (1976); *id.* at 612 (Burger,

C. J., concurring); *United States* v. *Payner*, 447 U.S. 727, 735 n.7 (1980), and of the proceedings over which it presides (cf. *Faretta* v. *California*, *supra*, 422 U.S. at 834–835 n.46).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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